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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 784

CHARLES (PETE) BLUE

Petitioner,

vs.

STATE OF INDIANA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

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No. 794

CHARLES (PETE) BLUE,

Petitioner,

vs.

STATE OF INDIANA

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

A. Summary Statement of Matters Involved

This case involves two questions, (a) whether petitioner, accused of assault and battery, had a fair and impartial trial as guaranteed by the Sixth Amendment to the Constitution of the United States, and (b) whether he has been deprived of his liberty by the judgment of the Court without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

Petitioner was charged in an affidavit with assault and battery (R. 1) and was tried by the Court sitting with

a jury (R. 1) the latter returning a verdict of guilty upon which the Court entered judgment, fining petitioner One Thousand ($1,000.00) Dollars, and committing him to confinement for Six months (R. 2).

Petitioner within the time allowed by law filed motion for new trial which was denied (R. 2-9) and prosecuted appeal from the judgment to the Supreme Court of Indiana, which Court affirmed said judgment (R. 17), whereupon petitioner filed in said Supreme Court his petition for rehearing, which was denied September 23, 1946, at which time the judgment became final (R. 35). The majority opinion of the Supreme Court of Indiana appears at Record Page 10, and the dissenting opinion therein at Record Page 17, both opinions being reported in 67 N. E. (2d) 377.

The alleged assault grew out of picketing at a strike bound plant in a small community, and which plant at the time of the assault engaged in vital war production.

The Prosecuting Attorney, in his cross-examination of defense witnesses, made as primary issues in a prosecution for ordinary assault and battery (a) the retarding of production in a plant making war essentials; (b) The deferred military status of witnesses engaged in war production (R. 3); (c) That the picket line was formed to hold up war production (R. 4); (d) That they knew who General Eisenhower was and that he "has been begging for more ammunition and supplies and materials and things for his armies" (R. 4); (e) That by being on the picket line they were aiding in the suppression of production of war materials (R. 4); (f) That it made no difference to them if their action cost a soldier's life (R. 4); (g) That it was perfectly all right to close factories by strikes to help men getting large wages at the expense of those at the front who needed supplies (R. 4); (h) That it was to them a matter of necessity to stop production of war

supplies and endanger the lives of boys overseas, bleeding and dying, for their country, in order to settle disputes between management and the Union (R. 6).

The Prosecuting Attorney in his argument to the jury referred to defendant and the strikers as (a) picketeers and hoodlums stopping war production while our boys are fighting for us; (R. 8)—To the defendant as a hoodlum, no better than a saboteur; (c) That "this defendant, his instructed witnesses and the hoodlums from this picket line are worse than saboteurs;" (R. 8)—(d) Appealed to the jury to "give this man the full extent of the law, and we won't have any more occurrences of this kind; (R. 8)—(e) That over in Germany such men as defendant would be shot by a firing squad; (R. 8). (f) That "These fellows (referring to labor unions) are worse than German spies sent over from Naziland"; (R. 9) (g) That defendant's witnesses "were instructed to help this saboteur in his acts against the Government of the United States"; (R. 9) and finally (h) "if you jurors think anything of your soldier and sailor sons and daughters, give this fellow the limit of the law;" (j) "and if you don't think of your own sons and daughters, for God's sake think of my son who is over there." (R. 9).

It is contended that this conduct, although unobjected to by defense counsel and unrestricted by the court, deprived petitioner of a fair and impartial trial upon the charge made in the affidavit, which in effect tried him for treason and sabotage against the government of the United States, a charge not made against him, thus depriving him of a fair and impartial trial, as well as his liberty, without due process of law.

B. This Court Has Jurisdiction

The jurisdiction of this Court is invoked by virtue of Clause B, Title 28, U. S. C. A., Section 344, namely:

> "Or where any title, right, privilege or immunity is especially set up or claimed by either party under the Constitution", etc.

And Rule 38 of the Revised Rules of the Supreme Court of the United States, namely:

> "The Supreme Court of Indiana has decided a Federal question in a way probably in conflict with applicable decisions of this Court."

The judgment of the Supreme Court of Indiana was entered June 21, 1946, and a petition for rehearing was denied September 23, 1946, at which time the judgment became final.

C. The Questions Presented

(a) Did the conduct of the Prosecuting Attorney in the trial on the affidavit for an assault and battery deprive petitioner of a fair and impartial trial?

(b) Did the conduct of the Prosecuting Attorney by injecting a collateral issue into the trial, to wit, the effect of picketing at a strike-bound plant engaged in production of vital war material, operate to place petitioner before the jury and try him for treason against the United States, an offense not charged, and thus depriving him of his liberty without due process of law.

D. Reasons Relied On for Allowance of Writ

The Fifth and Fourteenth amendments to the Constitution of the United States guarantee that no person shall be deprived of life, liberty, or property without due process

of law, and the Sixth Amendment to the Constitution of the United States ordains that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury.

The petitioner was charged with a simple assault and battery. The language and conduct of the Prosecuting Attorney actually charged and tried him before the Court and Jury as for treason and sabotage against the government of the United States while engaged in production of vital war materials, which in the ultimate and effect was a denial of due process.

The language of the Prosecuting Attorney, uttered at the time of the German break-through at the Bulge, poisoned the minds of the jury and inflamed their passion, not because of the offense alleged and being tried, but because the petitioner and others on a picket line said to be retarding and completely stopping the war effort of the United States, thus endangering the lives of sailors and soldiers fighting at the front.

The questions presented are not whether the evidence sustains the verdict and judgment, but whether there was due process of law and a fair and impartial trial. The majority opinion of the Supreme Court of Indiana holds the language and conduct of the Prosecuting Attorney did not deprive petitioner of a fair and impartial trial, which decision is a matter of public importance, and is contrary to the applicable decisions of this Court, to wit:

Bashfield v. *United States*, 272 U. S. 448;
New York Central Railroad Company v. *Bloom*, 279 U. S. 310;
Wiborg v. *United States*, 163 U. S. 632, and
Weems v. *United States*, 217 U. S. 349.

Conclusion

WHEREFORE, the premises considered, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the Supreme Court of Indiana commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of so much of the record in this cause as presents the question in Case No. 28094 and entitled on the docket of the Supreme Court of Indiana "Charles (Pete) Blue *vs.* State of Indiana", and that said judgment of said Supreme Court of Indiana may be reversed, and for such other and further relief as this Court may deem meet and proper.

CHARLES (PETE) BLUE,
Petitioner,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 794

CHARLES (PETE) BLUE,

Petitioner,

vs.

STATE OF INDIANA,

Respondent

BRIEF IN SUPPORT OF PETITION

Opinion of Court Below

The majority opinion of the Supreme Court of Indiana appears in the record at page 10, and the dissenting opinion therein at page 17, both opinions being reported in 67 N. E. (2d) 377.

Jurisdiction

1. The date of the judgment is June 21, 1946 (R. 2); petitioner's petition for rehearing was denied September 23, 1946 (R. 35).

2. The jurisdiction of this court is invoked by virtue of Clause B, Title 28 U. S. C. A., Section 344, namely:

> "Or where any title, right, privilege or immunity is especially set up or claimed by either party under the Constitution" etc.

and Rule 38 of the Revised Rules of the Supreme Court of the United States, namely:

> "The Supreme Court of Indiana has decided a Federal question in a way probably in conflict with applicable decisions of this Court."

3. The petitioner was charged with assault and battery. The Prosecuting Attorney in his examination of witnesses and argument to the jury injected extraneous matter such as the effect of strikes on war production, the injury resulting to soldiers and sailors at the front because of such strikes, and the accusing of petitioner of being a traitor, a Nazi spy, and Saboteur and one deserving death by a firing squad. The extraneous matter had the effect of trying petitioner for treason and the Supreme Court of Indiana, by its opinion and decision held the conduct and language of the Prosecuting Attorney proper and that petitioner had a fair and impartial trial, and that no constitutional immunity or privilege was violated or denied to him. The opinion is contrary to Clause B, Title 28 U. S. C. A., Section 344, and the applicable decisions of this Court, to wit:

Berger v. *United States*, 295 U. S. 78;
Bashfield v. *United States*, 272 U. S. 448;
New York Central Railroad Company v. *Johnson*, 279 U. S. 310;
Weems v. *United States*, 217 U. S. 349;
Wyborg v. *United States*, 163 U. S. 632.

Statement of the Case

This has already been stated in the preceding petition under paragraph A, page 1, which is hereby adopted and made a part of this brief.

Specification of Errors

The petitioner urges the following assigned errors:

1. That the conduct of the Prosecuting Attorney in the trial for an assault and battery deprived petitioner of a fair and impartial trial.

2. That the conduct of the Prosecuting Attorney by injecting an extraneous issue into the trial, to wit, the effect of picketing at a strike-bound plant engaged in production of vital war material operated to try petitioner for treason against the United States, a charge not made against him, so as to deprive him of his liberty without due process of law.

ARGUMENT

Summary of Argument

Point 1. The conduct of the Prosecuting Attorney deprived petitioner of a fair and impartial trial.

Point 2. Petitioner was tried as for treason against the United States, and as such deprived of his liberty without due process of law.

Point 1

Petitioner was charged by affidavit with assault and battery and was placed on trial to a court and jury for that offense.

Petitioner was a member of a Union engaged in picketing a plant wherein a strike was in progress. The plant was located in a rural community and was engaged in the production of vital war material.

In cross-examination of petitioner's witnesses the prosecuting attorney made an issue of the effect of a strike on production of vital war material, a fact not mentioned in direct examination. He inquired of the witnesses as to

their draft status, inquiring how the witnesses obtained a deferred classification; that the witness though classified as an essential war worker was not in essential work the day he was on the picket line preventing others from working; that the witness had a good soft job when a lot of boys were overseas fighting, and that the witness took a deferment and was glad to get it. That a witness knew Eisenhower and knew the picketing line was suppressing and retarding the making of vital war material, and retarding production; that the witness thought that all right, even though it meant a soldier's life, and it is perfectly all right to use force and violence to prevent others from working; that it is a case of necessity because there is a labor dispute to endanger the lives of boys overseas who were dying for their country by stopping production of vital war material so that they are left without ammunition and supplies, and that is higher and more important than their lives.

It is true defending counsel offered no objection to the questions of the Prosecuting Attorney. It is likewise true that the trial court did not intervene and stop the Prosecuting Attorney, but these failures cannot condone the wanton and willful conduct of the Prosecuting Attorney.

The Indiana Supreme Court so recognizes in *Sylvester* v. *State* (1933) 205 Ind. 628:

> "The record in this case is so exceptional with reference to the events which occurred in the trial that it is impossible to particularize the things on a combination of circumstances justifying the jury's verdict. The persistency of the state's attorney in applying improper and irrelevant questions to conditions might well support the conclusion that he proceeded with the trial upon the theory that the end justified the means. Such a position on the part of an attorney in the trial of a case cannot be approved. The apparent exposition of such purpose should be

immediately and positively controlled by the trial Court."

And in *People* v. *Wolf*, New York, 76 N. E. 592:

> "But why should she be tried at all unless she is tried fairly and in accordance with law? If her guilt is so clear, why should unwarranted means be used to secure a conviction? Juries do not halt over their duty in such cases, but are swift to convict when the evidence permits. In this case, above all others, it was unnecessary to go beyond the law, and indeed it can never be necessary in any case. Why should court and counsel violate the law in order to enforce it? What a pernicious example is presented when such officers entrusted with the most important duties in attempting to punish the guilty are themselves guilty of departing from the law."

New York Central Railroad Company v. *Johnson*, 279 U. S. 310:

> "The public interest requires that the court of its own motion, as is its power and duty, protect suiters in their right to a verdict uninfluenced by the appeals of counsel to bias or prejudice."

Bashfield v. *United States*, 272 U. S. 448:

> "The failure of petitioner's counsel to particularize an exception to the Court's inquiry does not preclude this court from correcting the error."

Point 2

Petitioner was tried as for treason against the United States, and as such deprived of his liberty without due process of law.

The Prosecuting Attorney in his submission to the jury concerns himself and devotes his argument to the effect of a picket line thrown around a strike-bound plant engaged

in the production of vital war material, and urges that effect as reason for conviction. Petitioner was one of some twenty-five pickets, yet the Prosecuting Attorney exhorts the jury to condemn him and cause him to suffer imprisonment for the presence of the other twenty-four. His purpose is crystal clear, as he meticulously chooses language to degrade petitioner as an enemy of his country. He says to the jury:

> "Ladies and gentlemen of the jury, do you want a few labor unions, picketeers and hoodlums to shut down our war effort and stop our war production while our boys are over there fighting for all of us * * *. This defendant Pete Blue, his instructed witnesses, and the hoodlums from this picket line are worse than saboteurs; * * * These fellows are worse than German spies sent over here from Naziland * * *. Men out there on the picket line and the other hoodlums who support Blue have been rehearsed and appear here as instructed witnesses to help this saboteur in his acts against the government of the United States."

There is no escaping from the fact that this language, violent in tenor, placed upon the petitioner the responsibility for the strike, and charged him with the consequences following the stoppage of the production of vital war material. The issue of assault and battery is taken away from the jury, and the issue of treason is substituted and presented. The Prosecuting Attorney painstakingly emphasizes the disasters that culminate from the strikes, and he begs punishment of those participating therein, whether their conduct is peaceable or violent, for he says to the jury:

> "This hoodlum by the acts which have been proven here in evidence is not better than a saboteur * * *. It is true we have things like this in big cities, but we won't have them in a peaceable county like this.

"Ladies and gentlemen of the jury, give this man the full extent of the law, and we won't have any more occurrences of this kind in our community, I guarantee you. Over in Germany such men as this defendant here would be shot by a firing squad * * *. If you jurors think anything of your soldier and sailor sons and daughters give this fellow the limit of the law, and if you don't think of your own sons and daughters, for God's sake think of my son who is over there."

The Supreme Court of Indiana said petitioner was guilty of an assault and battery. The majority opinion reviewed the conduct of the Prosecuting Attorney, and held the same proper and warranted. The dissenting opinion describes the conduct as intemperate and uttered in a patriotic fervor, and had the effect of trying petitioner for treason.

The Indiana Court considering a like situation in *Davis* v. *State*, 1941, 218 Ind. 506, said:

"In closing argument the prosecuting attorney said: 'This fellow is a fifth columnist,' and: "The defendant is one of those who call the American flag a dirty rag." There was no objection to these statements, and a motion to withdraw the submission. The court overruled the motion, but instructed the jury that the remarks of the prosecuting attorney were improper and that they should disregard them. Ordinarily it is assumed that the jury will obey such an admonition by the Court, and that the defendant's right to a fair trial is not prejudiced unless the remarks are so grossly damaging that it can be concluded that their evil effects were not cured by the court's admonition. The remarks of the prosecuting attorney here in question were entirely outside the record, and seem to have been made for the purpose of inflaming the minds of the jurors against the defendant, a stranger in the community. At the time of the trial (November, 1940) there was much agitation and discussion concerning subversive activities and suspicion of sabotage by persons charged or suspected of being Communists. There was evidence of excitement over these matters

among patriotic citizens. Under such circumstances grave doubts arise as to whether a fair trial has been given a stranger charged by the legal representatives of the state with being a Communist who disrespects the flag. Prosecuting officers, sworn to support the Constitution, and patriotic citizens, should be the first to insist upon protection of the constitutional right to a fair trial, and they should carefully avoid improprieties tending to prejudice that right, lest they be charged with sabotage of constitutional rights."

This court in *Berger* v. *United States*, 295 U. S. 78, after concluding that the argument of the District Attorney had been "undignified and intemperate," containing improper insinuations and assertions calculated to mislead the jury, said:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so, but while he may strike hard blows he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."
>
> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations which so plainly rest upon the Prosecuting Attorney will be faithfully observed. Consequently, improper suggestions, insinuations and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

Courts of appeal have been called upon times innumerable to pass upon the question whether or not conduct of counsel in argument to jury in bringing to their notice and attention extraneous matters, facts outside the record and unjustified by the evidence constitutes misconduct so as to be prejudicial impelling reversal. A test may be deduced from the decisions, that is, whether the misconduct might have influenced the jury, not that it actually did so.

In *Turner* v. *State*, 8 F. (2d) 25 it is said:

> "The statement of counsel was not inadvertent, was not made in the heat of argument, but it was deliberate and in our opinion it was intended to influence the jury improperly. In all human probability it would influence the jury."

U. S. v. *Sprengel*, 103 F. (2d) 876:

> "The Prosecuting Attorney also stated: 'We have got to convict these people. They will go wild with this kind of thing. The only way it can be done is by conviction'. Remarks of this tenor are intemperate in character and prejudicial in effect."

Turk v. *United States*, 20 F. (2d) 129:

> "The jury ought not to have been urged by counsel to convict the defendant for any of these alleged reasons and counsel must not expect approval by the court of a verdict sought or obtained on such grounds. When such reasons for verdicts are urged by counsel, it is difficult if not impossible to determine whether the verdicts were based on lawful or unlawful grounds."

Conclusion

It is the unquestionable privilege of counsel to indulge in all fair and prudent argument in support of his cause, and great latitude and the fullest freedom of speech is afforded counsel in performing the important duty of his office. This prerogative, however, is circumscribed and limited to a fair and honest presentation. The rights to

the fullest freedom of speech do not invest the advocate with either right, license or privilege to travel out of the record and base his argument on extraneous matter that has for its object the prejudicing of the jury so as to blind them as to the nature of the issues and inflame their passions and prejudices and thus hurry them by deliberate tactics and abusive language to a conviction.

The conduct and the language of the Prosecuting Attorney evinces a steady purpose to arouse the ire and hatred of the jury. At the time of its utterance, the successes of the Allies had been halted and the break-through occurred at the Bulge. It was a dark hour and the minds and hearts of those with sons in service in Europe were grieved and troubled. The hour was propitious for the Prosecuting Attorney, and he seized upon it for its full deadly effect upon the jury. Can there be honest doubt that the language might influence the jury? Can there be honest doubt that it actually did influence the jury? Did not the jury respond to the Prosecuting Attorney's request—"Give this man the full extent of the law?"

Petitioner though charged with assault and battery was actually tried for treason as being the responsible factor in stopping the production of vital war material.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers by granting a Writ of Certiorari, and thereafter reviewing and reversing the majority decision of the Supreme Court of Indiana.

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